

Seventeen-Fifty, Inc., d/b/a Marie Antoinette Hotel and Hotel and Restaurant Employees and Bartenders Union, Local 339, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. *Case No. 12-CA-1326. January 31, 1961*

DECISION AND ORDER

Upon charges duly filed on December 29, 1959, by Hotel and Restaurant Employees and Bartenders Union, Local 339, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter referred to as the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twelfth Region, issued a complaint and notice of hearing dated March 11, 1960, against Seventeen-Fifty, Inc., d/b/a Marie Antoinette Hotel, hereinafter referred to as the Respondent, alleging that the Respondent had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, hereinafter referred to as the Act. Copies of the charges, complaint, and notice of hearing before a Trial Examiner were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about December 22, 1959, and at all times thereafter, the Respondent refused to bargain collectively with the Union as the exclusive bargaining representative of a unit of certain employees of Prestige Hotels, Inc., d/b/a Marie Antoinette Hotel.

On March 23, 1960, the Respondent filed an answer to the complaint denying the allegations therein and moved to dismiss the complaint for lack of jurisdiction. On April 6, 1960, the said Regional Director issued an order postponing hearing indefinitely.

On April 28, 1960, the Respondent and the Union executed a stipulation of facts and a further stipulation whereby they agreed that the Board may find the facts as stipulated to be true and correct, to waive the customary hearing before a Trial Examiner, and the issuance of an Intermediate Report and proposed Decision and Order of the Board, and that the Board may make findings of fact and conclusions of law with respect to the allegations of the complaint. They further agreed that the stipulations, complaint and notice of hearing, order postponing hearing indefinitely, answer, and charges would constitute the entire record upon which the Board might make its findings, and provided for the filing of briefs with the Board.

By order dated May 6, 1960, the Board transferred the proceedings to and continued them before the Board for the purpose of making

findings of fact, conclusions of law, and the issuance of a decision and order. Subsequently, only the Respondent filed a brief.

Upon the basis of the aforesaid stipulations and the entire record in the case, the Board makes the following :

FINDINGS OF FACT

The Respondent, as a Florida corporation with its principal office and place of business located in Fort Lauderdale, Florida, on March 1, 1959, purchased a portion of the premises of the Marie Antoinette Hotel in Fort Lauderdale, hereinafter referred to as the Hotel. The remaining portion of the premises, known as the Annex, was at all material times owned by one Angela E. Hadapp. The purchase was made subject to an outstanding 99-year lease with operational rights held by Pavilion Marie Antoinette, Inc., a Florida corporation, hereinafter referred to as Pavilion, which had acquired a similar leasehold interest in the Annex. On November 24, 1958, prior to the date of the Respondent's purchase, Pavilion had subleased its leasehold interests in the premises to Prestige Hotels, Inc., hereinafter referred to as Prestige, which began operating the Hotel properties on December 21, 1958. Under the existing lease, the Respondent received rental payments only. At no time has there been any common ownership or control of the Hotel properties by Respondent, Pavilion, and Prestige.

On May 1, 1959, Pavilion defaulted on its lease. On October 7, 1959, the Respondent brought suit in a Florida State court in which it sought cancellation of the 99-year lease held by Pavilion and the sublease held by Prestige and the appointment of a receiver to manage the property. A receiver was appointed on November 4, 1959. On December 14, 1959, the court issued its final decree canceling all interests of Pavilion and Prestige in the Hotel.

On January 11, 1960, the receiver, apparently after sale pursuant to court order, delivered to the Respondent possession of the portion of the premises owned by it. On the same date, the Respondent acquired from Angela E. Hadapp a leasehold interest with operational rights to the Annex, and began the operation and management of the Hotel with substantially the same employees who had been employed by Prestige.

On June 19, 1959, while the Hotel was still under the operation and management of Prestige, the Union filed a representation petition with the Board, seeking to represent all of the Hotel employees and naming Prestige as the Employer. The hearing on the petition was held on July 8, 1959. As of that date, Prestige had an alleged gross income of \$205,000 for the period from December 21, 1958, to May 31,

1959. At the hearing Prestige stipulated that, based on its income for the 5 months, it anticipated a gross income for the full year of \$575,000, and that within the 12 months it would purchase from outside the State materials and supplies in excess of \$50,000. Prestige further stipulated that for the aforesaid period from December 21, 1958, to May 31, 1959, its cost of out-of-State advertising exceeded \$25,000.

Upon the basis of such stipulated facts, the Board found that Prestige was engaged in commerce within the meaning of the Act, and, as its anticipated gross income exceeded \$500,000, the Board found that it would effectuate the policies of the Act to assert jurisdiction in the proceeding.¹ The Board also found a unit of hotel employees to be appropriate and directed an election therein. Pursuant to such decision and direction of election, an election was held on August 28, 1959, which the Union won. On December 2, 1959, 4 weeks after the receiver was appointed in the State court action, the Union was certified as the exclusive bargaining agent for the Hotel employees.

On December 3, 1959, the Union wrote the manager of the Hotel, an employee of Prestige, requesting a bargaining meeting. No reply was made to this letter. On December 17, 1959, the Union set a letter to the "Marie Antoinette Hotel" again requesting a bargaining meeting. This letter was answered by the Respondent by letter of December 22, 1959. In this letter the Respondent stated that on advice of counsel it was not in a position to negotiate because, among other reasons, the receiver, not the Respondent, was the Employer of the Hotel employees and operator of the Hotel.

In the instant case, the parties have stipulated that for the period from November 24, 1958, to November 2, 1959, the actual gross revenue from the operations of the Hotel amounted to only \$293,407.85 and the actual cost of the out-of-State purchases of materials and supplies was only \$37,157.45 and that of advertising \$4,500.

Conclusions

Contending in part that it was under no legal obligation to bargain at the time the Union made its demand for bargaining, the Respondent also maintains that jurisdiction should not be asserted herein as its operations do not meet the Board's jurisdictional standards for hotel cases.² It also argues, in effect, that although the Board asserted jurisdiction in the representation proceeding, the Board did so upon estimates of gross income which proved incorrect, and, as the Respondent was not a party to the representation proceeding, the stipulation of the parties therein was not binding on it. We find merit in the Respondent's contention.

¹ Case No. 12-RC-649 (not published in NLRB volumes).

² *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261, 265.

If, in the present proceeding, the Board should consider the actual gross revenue derived from the operation of the Hotel while under Prestige's control as representative of the Respondent's current operations, it would follow that jurisdiction would not be asserted as such revenue does not meet the Board's jurisdictional standards for hotels.

The apparent theory of the complaint, however, is that the Board, having asserted jurisdiction in the representation proceeding on the basis of commerce data covering the same period of operations, the Respondent may not now, in the present proceeding, challenge the Board's commerce findings, and, therefore, as a successor in interest, is obligated to bargain with the certified representatives of its employees.³ It is not disputed, however, that the commerce data upon which the Board asserted jurisdiction in the prior proceeding was erroneous, and that the Respondent was neither party to that proceeding nor to the stipulation therein adopting the projected figures as the basis for the assertion of jurisdiction.

It would be inequitable to assert jurisdiction over the Respondent on the basis of erroneous commerce data where it contests jurisdiction, and impose upon it, as a successor employer, under the circumstances herein, the obligation to bargain with the previously certified representatives of its employees. We find, therefore, that it would not effectuate the policies of the Act to assert jurisdiction herein and, accordingly, dismiss the complaint.⁴

[The Board dismissed the complaint.]

MEMBER KIMBALL took no part in the consideration of the above Decision and Order.

³ *N.L.R.B. v. Albert Armato, et al.*, 199 F. 2d 800 (C.A. 7), enfg. 97 NLRB 971.

⁴ In view of our determination herein declining to assert jurisdiction, we find it unnecessary to pass on the Respondent's obligation to bargain with the Union.

